IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
WRIT PETITION NO.5670 OF 2006

Yekkar Shambhu Shetty,
Age: 75 years, residing
at Block No.3, Ground
Floor, John Villa,
Francis Road, Vile Parle
(West), Mumbai-400 056. .... Petitioner

- Versus -

Selwyn Peter Misquitta,
residing at John Villa,
2nd Floor, St. Francis
Road, Vile Parle (W),
Mumbai. .... Respondent

Sarvasri N.V. Walawalkar, Senior Advocate,
with G.H. Keluskar, Advocate, for the
Petitioner.

Sarvasri A.K. Abhyankar, Senior Advocate,
with D.A. Joseph, Advocate i/b M/s. David
& Associates for the Respondent.

CORAM: R.M.S. KHANDEPARKAR, J.

DATED: OCTOBER 11, 2006

ORAL JUDGMENT:

1. Heard. Rule. By consent, rule made returnable forthwith.

2. The petitioner challenges the Judgment and Order dated 23-6-2006 passed in Appeal No.3 of 2004 by the Appellate Bench of the Small Causes Court (Bandra Branch), Mumbai.

3. Few facts relevant for the decision are that the respondent herein filed R.A.E. Suit No.394 of 1996 for eviction of the petitioner on various grounds. The summons of the said suit was served upon the petitioner by affixation thereof on the premises and ultimately the suit came to be decreed in favour of the respondent on 17-1-1998. On 18-2-1998 the respondent filed Misc. Notice No.52 of 1998 for execution of the said decree. The necessary order in terms of Order 21, Rule 12 of the Code of Civil Procedure was issued on 14-3-2000 and the regular Execution Application No.18 of 2000 came to be filed on 24-3-2000. On the basis of the said application, the warrant for possession in favour of the respondent came to be issued by the Executing Court on 17-4-2000. When the respondent sought to execute the said order, the same was sought to be obstructed by one Shri Mahamood Ibrahim Safi and his wife on the ground that they were in possession of the premises. Consequently, the respondent took out Obstructionist Notice No.5 of 2000 on 25-4-2000. The said notice was served by affixation at the premises on 13-6-2000. Subsequent thereto, on 16-8-2000 the petitioner herein took out Misc. Notice No.207 of 2000 for setting aside the ex parte decree dated 17-1-1998. On the very day, the trial Court on the said application stayed the execution of the decree. On 30-1-2001 the petitioner herein filed affidavit of obstructionist in Misc.

Notice No.207 of 2000. By order dated 26-9-2003 the trial Court dismissed the Misc. Notice No.207 of 2000 and consequently the application for setting aside the decree stood dismissed and the stay for execution also stood vacated. The petitioner thereupon on 21-11-2003 filed Appeal No.3 of 2004 against the said order of the trial Court and also obtained stay of the execution. The respondent filed his reply to the said proceedings before the Appellate Bench on 2-12-2003, followed by rejoinder by the petitioner on 10-12-2003. Meanwhile, the parties also led evidence in the form of affidavits during the period from December, 2003 to February, 2004 in Obstructionist Notice No.5 of 2000 and the trial Court by order dated 20-3-2004 allowed the Obstructionist Notice No.5 of 2000 in favour of the respondent. Thereupon the petitioner took out Notice No.661 of 2004 before the Appellate Bench for stay of execution of the decree on 20-3-2004. The said notice was replied by the respondent on 23-3-2004. After hearing the parties, the Appellate Bench of the Small Causes Court was pleased to confirm the stay of the execution while allowing Notice No.2253 of 2003 and Notice No.661 of 2004 in Appeal No.3 of 2004. The said order was passed on 25-3-2004 which was sought to be challenged by the respondent in Writ Petition No.3333 of 2004, without any success. The Appellate Bench of the Small Causes Court thereafter, after hearing the

parties, disposed of the appeal by the impugned order dated 23-6-2006. Hence the petition.

4. The only ground on which the impugned order is sought to be challenged along with the order dated 26-9-2003 passed by the learned single Judge of the Small Causes Court is that there was no service of summons in the manner required to be made in terms of the provisions of law comprised under Order V of the C.P.C. and therefore the decree is a nullity and not executable against the petitioner and that, therefore, the Courts below ought to have made the Notice No.207 of 2000 absolute in favour of the petitioner. It is the contention on behalf of the petitioner that at the time when the summons was sought to be served upon the petitioner, he was carrying out business in Mumbai and on the wrong assumption of absence of the petitioner, the summons was sought to be served by affixation thereof to the premises in question. It was the practice of the petitioner to leave the suit premises early morning and return during late night hours on account of the fact that the petitioner was required to attend his business during those hours. It is further case of the petitioner that the summons could have been served by affixation in terms of Order V, Rule 17 only after exercise of due and reasonable diligence to find out the defendant and in the absence thereof, the

affixation of summons at the premises would not be a good service of summons and it would amount to no service of summons and, therefore, the proceedings in such suit on the basis of such service of summons would stand vitiated and for the same reason the decree passed therein would be bad in law. Drawing attention to the report by the Bailiff at the time of affixation of the summons, it was sought to be argued on behalf of the petitioner that the intimation which is stated to have been given to the Bailiff about the absence of the petitioner for two years preceding the day on which the Bailiff had gone to the premises, was by one Selwyn Misquitta, who had been the beneficiary of the decree passed in the said suit. It was further contention on behalf of the petitioner that once the petitioner was not served with the summons in accordance with the provisions of law, the limitation for filing the application for setting aside the decree would commence from the date of knowledge about the decree and in the case in hand, the petitioner got the knowledge of the decree from one Mahamood Ibrahim Safi who was temporarily residing with the consent of the petitioner in the suit premises for few days and during the absence of the petitioner from April to June, 2004. It was his further contention that the actual knowledge about the decree was received by the petitioner on 3-8-2004 when the same was brought to his notice by the said Mahamood

Ibrahim Safi as there was attempt on the part of the respondent to dispossess the said Mahamood Ibrahim Safi from the premises on the strength of the warrant issued for execution of the said decree.

5. On the other hand, it is the case of the respondent that since the Bailiff, inspite of three occasions having tried to serve the summons personally to the petitioner and as he was not available, after obtaining proper order from the trial Court, the summons was served by affixation on the door of the premises. The summons having been affixed after proper efforts to locate the petitioner and as he was not available at the premises inspite of three attempts in that regard, the service of summons by affixation cannot be found fault with. Besides, undisputedly, the obstructionist was the person staying in the premises on behalf of the petitioner and the execution was sought to be effected in April, 2004 whereas the application for setting aside the decree was filed as late as on 16-8-2000, without disclosing sufficient cause for the delay in filing such application.

6. Attention was sought to be drawn on behalf of the petitioner to the decision in the matter of **Shri Lal Mohammed Mestry v. Shri Abdul Sakur Abdul Gafoor & Anr.,** reported in 2002 (4) All M.R. 420.

7. The lower Appellate Court while dealing with the issue regarding service of summons has arrived at the finding that in addition to service of summons by affixation, the summons was sent to the petitioner by way of R.P.A.D. and under certificate of posting and so far as the summons by R.P.A.D. is concerned, the packet had returned with the postal endorsement "Not claimed" and the letter which was sent under the certificate of posting was never returned to the respondent and considering the same, the Appellate Court has held that the same goes to show that the petitioner was served by way of R.P.A.D. and under the certificate of posting. It is pertinent to note that the petitioner has not challenged this finding nor attention has been drawn to any material which could disclose the said finding of the lower Appellate Court to be either incorrect or perverse or contrary to the materials on record.

8. It is to be noted that prior to enforcement of the C.P.C. (Amendment Act), 1999, which came into force from 1-7-2002, Rule 19-A of Order V clearly permitted the service of summons by post, in addition to personal service. In the case in hand, undisputedly, the summons was issued in the year 1996 when the said Rule was very much in force.

9. Undoubtedly, Rule 10 of Order V of the C.P.C. requires service of the summons to be made by delivering or tendering a copy thereof to the addressee. The Rule 12 provides that wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient. In terms of Rule 15 the service on any adult member of the family at the residence of the defendant would be a good service.

10. In the case in hand, the Bailiff on three occasions attempted to serve the summons upon the petitioner, once on 20-6-1996, then on 25-6-1996 and lastly on 1-7-1996 and the Bailiff's reports of all the three occasions undisputedly disclose that the petitioner was not found in the premises and the premises were found locked. The reports also disclose that one Selwyn Misquitta, a neighbour of the defendant, informed the Bailiff that two years preceding his visit to the premises, the petitioner had ceased to reside in the said premises. Undoubtedly, it is sought to be contended on behalf of the petitioner that the said Selwyn Misquitta had vested interest in the matter and might have given wrong information as was to be benefited by the decree to be passed in the suit. Be it as it may, fact remains that on all three occasions the petitioner was not found at the residential place of the petitioner as it is not

disputed that the same was the residential place of the petitioner at the relevant time. The reports also disclose that on all the three occasions the premises were found locked. It is not the case of the petitioner that he had furnished any other address to the respondent for service of any notice. Obviously it discloses that nobody could have received the summons on behalf of the petitioner on any of the three occasions when the Bailiff had visited the premises. Being so, the Bailiff himself could have affixed the summons on the door of the premises in terms of Rule 17 or Order V of the C.P.C..

11. It is sought to be contended on behalf of the petitioner that question of affixation of summons on the door can arise only after the serving officer after using all due and reasonable diligence finds the defendant to be absent at the residence and there is no likelihood of he being found at the residence within reasonable time. Indeed, that is the requirement of Rule 17 to enable the Bailiff to affix the summons on the door of the premises. In the case in hand, apart from the fact that on all three occasions the Bailiff had attempted to serve the summons by approaching the defendant at his residential place and on all the three occasions the petitioner was not found at the residence and the premises were found locked, the same has been

clearly established from the Bailiff's reports, and the said fact is also not disputed by the petitioner at any stage of the proceedings. This clearly discloses due and reasonable diligence having been exercised in ascertaining the non-availability of the petitioner at his residential place. And yet, it is pertinent to note that the Bailiff did not proceed to affix the summons on the door of the premises in question immediately thereafter. In fact, the respondent moved an application before the Court and the Court being satisfied about the non-availability of the petitioner at the residential place to serve the summons, allowed the application and permitted service of summons by affixation thereof as well as by R.P.A.D. and under certificate of posting. Undisputedly, for the service of summons all the modes were duly complied with. Being so, there is absolutely no substance in the contention about failure on the part of the respondent to get the summons duly served upon the petitioner.

12. Attention was sought to be drawn to para 5 of the decision in **Shri Lal Mohammed Mestry's** case (supra) wherein it was observed that

> "It is always to be borne in mind that service of summons under order V Rule 20 of C.P.C., cannot be allowed as a matter

> of course, and in a casual manner. Record should disclose the satisfaction of the Court about avoidance of service of summons in regular course by the defendant and necessity for allowing such substituted service of summons. It is also to be borne in mind that service of summons is not an idle formality. It has to be an effective service so that the persons against whom proceedings are initiated get sufficient and fair opportunity to defend their rights."

Apparently, the observations are in relation to substitute service under Rule 20 of Order V and not relating to Rule 17. No doubt, even in case of Rule 17, the service has to be effective service and not an idle formality. However, in the case in hand, as already seen above, there has been effective service of summons in terms of the provisions of law comprised under Rules 17 and 19-A, as it stood at the relevant time. Being so, no fault can be found in rejecting the application filed by the petitioner for setting aside the decree on the ground of absence of service of summons in the suit upon the petitioner. Once the Courts below having found that the summons was duly served and the said finding being duly corroborated by the materials on record, no

fault can be found with the impugned order and it does not disclose any jurisdictional error, either on the part of the trial Court or on the part of the lower Appellate Court so as to warrant interference in exercise of powers under Article 227 of the Constitution of India.

13. Apart from the fact that the records clearly disclose proper service of summons, the respondent is justified in contending that the petitioner had also failed to disclose sufficient cause for delay in approaching the trial Court with an application under Order IX, Rule 13 of the C.P.C.. Undisputedly, the decree was passed on 17-1-1998. The application under Order IX, Rule 13 was filed only on 16-8-2000. Undoubtedly, it is the contention on behalf of the petitioner that he came to know about the decree from Mahamood Ibrahim Safi on 3-8-2000. However, as rightly submitted on behalf of the respondent, it is difficult to believe this contention on behalf of the petitioner. It is the case of the petitioner that the said Mahamood Ibrahim Safi along with his wife was residing in the premises with the consent of the petitioner as at the relevant time the residential house of Mahamood Safi was under repairs. It is a matter of record that the respondent sought to execute the decree on 19-4-2000 when Mahamood Safi caused obstruction to the execution

of the decree and the respondent took out obstructionist notice on 25-4-2000 which was affixed on the premises on 13-6-2000. It is the case of the petitioner himself that he was out of town from April to June, 2000 and he returned to Mumbai on or about 26-6-2000. It is also the case of the petitioner that during his absence, his son continued to stay in Mumbai. If Mahamood Safi and his wife were allowed to reside in the premises with the consent of the petitioner and during the absence of the petitioner, there was attempt on the part of the respondent to execute the decree for eviction and it was obstructed by Mahamood Safi, it is difficult to believe that the said fact was not brought to the notice of the petitioner immediately thereafter. The application under Order IX, Rule 13, which was filed by the petitioner, undoubtedly, states that

> "In the 1st week of April, 2000 I and my wife went to my native place at Yekkar, Mangalore, Taluka Karnataka State and after staying their for about 40 days we went to Bangalore to see our daughters and thereafter returned to Bombay on or about 26th June, 2000. During the said period our son was sleeping in the Hotel itself due to pressure of work. When we returned to Bombay, I learnt that the

> said Mohammed Ibrahim Safi and his wife have gone to his native place at Kutch, Gujarat State in connection with certain property dispute of his family. He returned to Bombay on or about 3rd August, 2000, when he informed me that during my absence on or about 19/4/2000 some persons from this Hon'ble Court had come to the suit premises in connection with certain orders passed by this Hon'ble Court with regard to the suit premises in the suit filed against me by the Plaintiff."

Obviously Mahamood Safi had informed the petitioner not only about some persons having come to the premises in connection with execution of decree but it was also informed to him that those persons had come in connection with the order passed by the Court in the suit filed by the respondent against the plaintiff in relation to the suit premises. He had also given the number of the suit. If Mohamood Safi had given all these detail information to the petitioner, on having met him after his return from Gujarat, it is difficult to believe that Mohamood Safi would not have passed on this information to the petitioner immediately after the attempt on the part of the respondent to execute the

decree in April, 2000 knowing well that the persons had come to evict the petitioner from the suit premises. Added to this, the son of the petitioner was very much in the town. Nothing prevented Mohamood Safi from informing about the same to the son of the petitioner. The application filed by the petitioner does not disclose all the necessary details so as to believe the petitioner's story about the acquisition of knowledge about the decree only on 3-8-2000. A party approaching the Court with the expectation to exercise discretion in favour of the party has to come clean. The petitioner has not disclosed as to when Mohamood Safi proceeded to Gujarat and since what date Mohamood Safi had ceased to reside in the premises. The petitioner has not disclosed in the application as to what prevented his son from getting the said information at the relevant time. The petitioner has not disclosed as to why the petitioner did not enquire from Mohamood Safi about his neglect, if any, in imparting this information to the petitioner immediately after April, 2000. All these information was required to be disclosed in the application if the petitioner wanted the Court to believe the petitioner's contention that there was no occasion for the petitioner to know about the decree prior to 3-8-2000. Added to this, the petitioner nowhere disputes the fact about affixation of summons in the suit to the premises as well as affixation of the

obstructionist notice to the premises in April, 2000. It is not the case of the petitioner that the notices which were affixed to the door disappeared from the place and that, therefore, there was no occasion for the petitioner to know about the suit as well as about the obstructionist notice immediately after the affixation of the summons and the notice to the door of the premises. All these facts clearly disclose that the contention of the petitioner that he came to know on 3-8-2000, for the first time, about the decree cannot be believed. Obviously therefore, there was no sufficient cause for the delay in approaching the Court with the application under Order IX, Rule 13 of the C.P.C..

14. For the reasons stated above, therefore, there is no case made out for interference in the impugned order and the petition therefore fails and is hereby dismissed. The rule is discharged with no order as to costs.

15. At this stage, the learned Advocate for the petitioner prays for stay of execution of the decree for a period of eight weeks which is objected to on behalf of the respondent. However, I am inclined to grant time upto 20-12-2006, subject to that the petitioner shall not induct any third party nor shall create any third party interest in the suit premises and shall file

undertaking of himself as well as of all the major members of his family to that effect before the Registrar (Judl.) within a period of two weeks and further that they would hand over the peaceful vacant possession of the premises to the respondent on or before 20-12-2006.

(R.M.S. Khandeparkar, J.)

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